

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
E I L E D

AUG 30 1978

WILLIAM F. BROWN, JR., CLERK

October Term, 1978

No. **78-355**

SAUDCO LIMITED & WILLIAM L. TAUB, Petitioners

v.

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.
Respondents

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT**

Circuit

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No.

SAUDCO LIMITED & WILLIAM L. TAUB, *Petitioners*,

v.

TWENTIETH CENTURY-FOX FILM CORPORATION, et al
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners, Saudco Limited and William L. Taub pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on June 1, 1978, which affirmed a judgment in favor of respondent Twentieth Century-Fox Film Corporation in the sum of \$208,868.34, respondent Columbia Pictures Industries, Inc. in the sum of \$108,868.34, respondent United Artists Corporation in the sum of \$48,868.34, respondent Universal City Studios, Inc. in the sum of \$113,868.34, respondent Warner Bros. Pictures, Inc. in the sum of \$18,868.34, respondent Walt Disney Productions in the sum of \$13,868.34, and re-

spondent Metro-Goldwyn-Mayer, Inc. in the sum of \$58,868.34, plus attorneys' fees of \$57,375.00, totaling \$626,353.38.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is unreported and is set forth at page A15 of the Appendix.¹ The opinions of the District Court are unreported and are set forth in the Appendix as follows:

1. The opinion and order dated June 17, 1975, ordering the entry of a judgment as to liability against petitioners, is set forth at App. A1 *et seq.*
2. The opinion, order and judgment dated May 27, 1977, awarding damages against petitioners in the amount of \$568,978.38 and attorneys' fees in the sum of \$57,375.00, is set forth in App. A7 *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a damage award of over \$600,000.00 for alleged infringement of 106 motion picture films was appropriate where plaintiffs admit that 76 of the films never could have been exhibited at all and only allege that "at least certain" of 14 of the films were ever exhibited to anybody or whether such an award constitutes a manifest miscarriage of justice directly in the teeth of the "not as a penalty" proviso of the applicable Copyright Act?

1. Citations to the Appendix to this petition are in the form "App. A____."

STATUTORY PROVISION INVOLVED

The statutory provision involved is 17 U.S.C. §101(b) (1970 ed.) and reads:

101 Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable.***

(b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as herein-after stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of \$200 nor be less than the sum of \$50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures where the infringer shall show that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen such damages shall not exceed the sum of \$100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereto to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such dam-

ages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of \$5,000 nor be less than \$250, and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, \$10 for every infringing copy made of, sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, \$50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance; in the case of other musical compositions \$10 for every infringing performance.

STATEMENT OF THE CASE

The Judgment

The judgment below for \$626,353.38, was entered on respondents' motion for summary judgment. The Court of Appeals affirmed without argument.

The Complaint, Answer & Cross-Complaint

On May 9, 1974, respondent Twentieth Century-Fox Film Corporation filed a complaint in the United States District Court for the Southern District of Florida, alleging that petitioners had infringed and were threatening to infringe the copyrights of certain of respondent's motion pictures. On May 31, 1974, by an amended complaint, forty-two (42) additional plaintiffs were purportedly joined in the action. Thirty-six (36) of these plaintiffs are no longer part of the case.

The amended complaint alleged that the copyrights of 106 films were infringed by petitioners. The amended complaint prayed for damages consisting of all the profits which petitioners had derived from the copyright infringements, plus damages "as to the Court shall appear just and proper pursuant to the provisions of the Copyright Law, but in no event less than \$250.00 for each separate copyright." In addition, the Complaint prayed for injunctive relief and that petitioners be required to deliver to the Court all negatives and prints of the subject films in their possession or under their control.

On July 17, 1974, petitioners filed their Answer to the Amended Complaint, denying the allegations of same and averring that petitioner Taub at no time owned or possessed, or held himself out as owning or possessing, any of the subject motion picture films. In addition, petitioners filed a cross-Complaint against Samuel Kipnis, Tom Ogburn and Flamingo Film Service ("Flamingo") for breach of a certain oral agreement. By this agreement,

Saudco purchased the foreign distribution rights to all 106 films for exhibition in Greece.²

The Defaults

On June 2, 1975, the District Court ordered the entry of a default against petitioners for failures of petitioners to appear at depositions.

On June 18, 1975, the Court made its "Further Findings of Fact and Conclusions of Law" adjudicating petitioners' liability for the claimed copyright infringements and entered a default judgment as to liability against petitioners. The default judgment permanently enjoined petitioners from selling, leasing, renting, distributing or exhibiting any of the subject motion pictures and further ordered that any of the films in the possession, custody or control of petitioners be delivered to respondents.

On October 18, 1976, respondents filed a Motion for Summary Judgment, seeking a damage award of "at least \$5,000 per infringement" and an award of attorneys' fees. Respondents, in addition, renewed their previous Motion for Sanctions under Rule 37, Fed. R. Civ. P., on which ruling had been reserved by the Court.

On December 1, 1976, respondents filed "Requests for Admissions and Statement of Material Facts and Proposed Findings and Conclusions." According to the facts alleged therein, at most, petitioners exhibited "at least certain" of only 14 motion picture films. Further, respondents therein admitted that 76 of the films spent the entire time in transit, to and from Greece, where those 76 films were refused entry. Respondents further alleged that by reason of petitioners' litigation conduct, they had been deprived of the means of proving actual damages. Respondents prayed that the District Court exercise its discretion pursuant to the "in lieu" provision of Section

2. In fact, Kipnis, Ogburn and Flamingo did not own these rights.

101 of the Copyright Act and award a minimum of \$250.00 per infringement. In addition, respondents renewed their request for an award of attorneys' fees and their expenses.

On February 8, 1977, the Court ordered petitioners to appear on February 21, 1977, to show cause why respondents' Motion for Summary Judgment should not be granted. The Hearing to Show Cause was subsequently reset for February 22, 1977 by Order of Court and later adjourned until March 10, 1977.

Petitioners, through prior counsel, failed to respond to either the Motion for Summary Judgment, Motion for Sanctions, or Requests for Admissions. Petitioners failed to answer the District Court's Questionnaire³ to all parties. Prior counsel for petitioners was outside of the jurisdiction and did not appear at the hearing to show cause on March 10, 1977. Although the Court excused counsel's absence, and directed that a Memorandum in Opposition to the Motion for Summary Judgment be filed, prior counsel never did so. At that point, the "Court determined to rule on the [respondents'] Motions for Summary Judgment and for sanctions."⁴

On May 27, 1977, the District Court entered Judgment as to Damages against petitioners in the amount of \$568,978.38. In addition, the Court awarded attorneys' fees in the amount of \$57,375.00.

The District Court's Opinion

The District Court awarded the statutory maximum amount (i.e., \$5,000) for each of the 106 alleged copyright infringements. A review of the court's opinion makes it clear that the court based its award of damages upon peti-

3. On November 11, 1976, the District Court had submitted a questionnaire concerning the current status of the case.

4. District Court Opinion at 2, App. A8.

tioners' failures to respond to respondents' Requests for Admissions and Statement of Material Facts and Proposed Findings and Conclusions.

The District Court did not consider petitioners' denials in the Answer to the Amended Complaint at all in considering the Requests for Admissions.

The District Court stressed that petitioners had failed to respond to certain orders of the Court to respond to discovery. The District Court made no independent findings of fact whatsoever. Moreover, the District Court awarded the statutory maximum damages despite the fact that respondents themselves admitted in their Requests for Admissions that 76 of the 106 films involved in this litigation never could have been exhibited at all and that only "certain" of 14 of the films were ever exhibited.

Petitioners filed a Motion for Rehearing and/or to Vacate Final Judgment on June 10, 1977. On June 23, 1977, petitioners also filed a Motion for Relief from Judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Each of these motions was denied by the District Court in its Order dated July 27, 1977. Appeals were timely filed from these determinations.

The Decision of The Court of Appeals

On July 27, 1977, petitioners filed a Notice of Appeal from the Judgment as to Damages to the United States Court of Appeals for the Fifth Circuit. Petitioners claimed on appeal, *inter alia*, that the lower court committed error in entering judgment as to damages without affording them a trial and that the damages awarded were excessive, oppressive and unjust under the provisions of the applicable Copyright Act.

On June 1, 1978, the Court of Appeals, without any hearing or argument, affirmed the judgment of the District Court. In a one-page opinion, the sole rationale given by the Court of Appeals for affirming the damage award was

"the repeated failures of defendants to respond to plaintiffs['] discovery attempts seeking to establish their actual damages. . . ."⁵

The Underlying Agreement

During the early months of 1973, one Tom Ogburn approached petitioner Taub as agent for Saudco. Ogburn falsely represented that he, one Samuel Kipnis and the Flamingo Film Service ("Flamingo") were the owners of the foreign distribution rights to all of the 106 films. In fact, neither Ogburn, Kipnis nor Flamingo owned any such rights. Petitioners, however, were entirely unaware of that fact.⁶

Petitioners paid Ogburn approximately \$12,000 in March and May of 1973 for the films, and subsequently contracted with the Hellenic Broadcasting Institute ("Hellenic") to distribute the films in Greece. Petitioners never represented themselves as being the owners of the subject films. Petitioners, in fact, only *consigned* the films to Hellenic. On arrival, 76 of the 106 films were refused entry due to lack of necessary instruments. These were returned to Miami⁷ and spent the entire time in transit, as respondents admit.

Needless to mention, petitioners received no profits from this transaction. At the same time, it was petitioners, not respondents, who suffered. Respondents suffered no actual damages as a result of any of the alleged infringements.

5. Court of Appeals Opinion at 2, App. A16.

6. Upon learning that Ogburn, *et al.*, were not the lawful owners, petitioners immediately reported Ogburn, *et al.*, to the United States Attorney's Office.

7. On arrival in Miami, the films were immediately impounded by U.S. Customs.

REASONS FOR GRANTING THE WRIT

The decisions below do tremendous violence to the plain language of the applicable Copyright Act.⁸ By ignoring Congress' explicit direction that damages awarded "in lieu of" actual damages "shall not be regarded as a penalty", the courts below have seriously undermined manifest Congressional intent and virtually emasculated the "not as a penalty" proviso. Thus, the decisions below pervert the proper application of the applicable Copyright Act. Overall, the decisions below embody an outrageous miscarriage of justice.

CONFLICT AMONG THE CIRCUITS AND WITH PRIOR DECISIONS OF THIS COURT

The Damages Awarded Below Constitute Penalties Contrary To The Express Language And Judicial Interpretation Of §101 Of The Applicable Copyright Act

The Copyright Act "was enacted for the protection of property rights and not for the purpose of providing a means by which a penalty could be collected in the nature of damages when in fact there were no damages." *Norm Co. v. John A. Brown Co.*, 26 F. Supp. 707, 710 (W.D. Oklahoma 1939). As this Court has well pointed out in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940):

"The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving the

8. 17 U.S.C. § 1 *et seq.* (1970 ed.) Effective January 1, 1978, Congress enacted the first major revision of the Copyright Act since 1909. This action was brought under and is controlled by the former provisions.

copyright proprietor profits which are not attributable to the infringement."⁹ 309 U.S. at 399.

Section 101 of the applicable Copyright Act, 17 U.S.C. §101 (1970 ed.), provides, *inter alia*, that a copyright infringer is liable for "such damages as to the court shall appear to be just" . . . which damages "shall not be regarded as a penalty."¹⁰ Congress has thus given explicit direction that damages awarded "in lieu of" actual damages must not be penal in nature.

Courts nationwide have heeded this direction—until the decisions below. In the now celebrated case of *Brady v. Daly*, 175 U.S. 148 (1899),¹¹ this Court instructed:

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dra-

9. To like effect are *Blumcraft of Pittsburgh v. Newman Bros., Inc.*, 337 F. Supp. 859, 865 (S.D. Ohio 1971); *Malsed v. Marshall Field & Co.*, 96 F. Supp. 372, 377 (W.D. Wash. 1951). All emphasis is supplied unless otherwise indicated.

10. The full text of the statute is set out at Statutory Provision Involved, *supra*, at 3-4.

11. The Copyright Act of 1909 re-enacted §101 of the Copyright Act of 1870 considered in *Brady v. Daly*, *supra*. There was no relevant change. Compare 16 Stat. 198, 214 (1870).

matic composition is, in the words of the statute, "liable for damages therefore." This means all the damages that are the direct result of his wrongful act. *The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. The whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to sue. It has nothing in the natu[r]e of a quittance action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture.*" 175 U.S. at 154-155. ¹², ¹³

Similarly, in *Russell & Stoll Co. v. Oceanic Electrical Supply Co., Inc.*, 80 F.2d 864 (2d Cir. 1936), the Court of Appeals, consisting of Judges Hand, Swan and Hand, ruled:

"The plaintiff seems to suppose, that, regardless of any loss, it may satisfy its spleen by treating the allowances as penalties; but the section [101] expressly declares that they are not to be regarded as such." 80 F.2d at 865.

That distinguished court concluded:

"The minimum was all that was proper, when we can see, as we can, that the plaintiff has not been damaged." 80 F.2d at 865.¹⁴

12. And see 175 U.S. at 156-158.

13. Certiorari is appropriate to review lower court decisions conflicting with prior holdings of this Court. U.S. Sup. Ct. Rules, Rule 19(b).

14. Certiorari is plainly appropriate to resolve conflicts between the circuits. U.S. Sup. Ct. Rules, Rule 19(b).

These holdings have never been disturbed. They represent the applicable law.¹⁵ The decisions below plainly bespeak the penal nature of the awards in this case. The only reason given by the Court of Appeals for affirming the amount of damages assessed was "the repeated failure of defendants to respond to plaintiffs['] discovery attempts seeking to establish their actual damages***";¹⁶ Anger is no basis for a damage award and the Copyright Act explicitly outlaws such a rationale. The damage done when such a rationale is utilized is plainly demonstrated by the manifest injustice done below.

The District Court's determinations took the same misguided approach. In its opinion, the District Court revealed its frustration that petitioners had failed to comply with discovery.¹⁷ Rather than penalizing the petitioners by resorting to the wide range of lesser sanctions at its disposal,¹⁸ the Court, eschewing the explicit language of the "in lieu" provision, disciplined petitioners by assessing

15. Other cases so holding include *Hiawatha Card Co. v. Colour-picture Publishers, Inc.*, 255 F. Supp. 1015, 1019 (E.D. Mich. 1966); *Kraft v. Cohen*, 32 F. Supp. 821, 825 (E.D. Pa. 1940).

16. Court of Appeals Opinion at 2, App. A16.

17. The District Court emphasized that petitioners failed to reply to respondents' Requests for Admissions and Statement of Material Facts and Proposed Findings and Conclusions; failed to reply to the Court's questionnaire as to the current status of the case; failed to answer the Court's order that they show cause why the respondents' Motion for Summary Judgment should not be granted; and failed, through their counsel, to appear at a subsequent Show Cause hearing. At that point, "this Court determined to rule on the plaintiffs['] Motions for Summary Judgment and for sanctions." (App. A8). The Court, in addition, chastised the petitioners for "their failure to appear at a deposition" . . ., their "willful and deliberate violation of this Court's orders . . . to produce documents", and their "failure to comply with the provisions of paragraph 3 of this Court's Judgment as to Liability . . ." (App. A8).

18. See Rule 37, Fed. R. Civ. P.

damages against them in the statutory maximum amount. As this Court and the Court of Appeals for the Second Circuit have both held, such a course of decision was error.

Nonetheless, this amount was considered "appropriate" on the basis of certain self-serving pleadings filed by respondents. Solely because petitioners did not answer were these deemed admitted. Assuming *arguendo* that the above pleadings must be deemed admitted,¹⁹ nonetheless at no time in the course of this litigation have any of the following elements been established in any way:

1. Petitioners were never shown to have been in actual possession of any of the subject films;
2. Petitioners were never shown to have received any profits or earnings as a result of any infringement; and
3. Respondents were never shown to have suffered any actual damages as a result of any infringement.²⁰

It is thus apparent that the District Court was more concerned that the judgment penalize petitioners for their litigation behavior rather than properly fix statutory damages under the Copyright Act. Indeed, under the above-described facts and circumstances, an award of \$568,000 in damages constitutes a manifest injustice.

Since, as stated above, it has never been shown that petitioners received any profits or that respondents suffered any actual damages as a result of the alleged infringements, it seems patently clear that a minimum award was appropriate. Moreover, even respondents admit that 76 of the 106 films involved in this litigation never

19. The District Court should have given some consideration to the denials in petitioners' Answer to the Amended Complaint.

20. In fact, petitioners were merely innocent purchasers, who, upon gaining knowledge that the persons from whom the films were "acquired" were not the lawful owners thereof, immediately reported this to the appropriate authorities. (See p. 9, fn. 6, *supra*).

reached their destination.²¹ Admittedly, these films never left the cartons in which they were shipped to Greece. These films were returned, approximately five (5) months later, to Miami, Florida.²² These films spent the entire time in transit. The cartons were never even opened. No one denies any of this.

Respondents' own Requests for Admissions further admit that, of an additional 14 films, only "at least certain" of these motion pictures were, in fact, telecast***.²³ Respondents conclude by admitting that they have no knowledge nor any proof that any of the 16 remaining films of the 106 involved were ever removed from their tins.

Thus, respondents were awarded maximum statutory damages for 106 films when only "at least certain" of 14 were ever even alleged to have been exhibited. Not only is this a penalty, but, petitioners respectfully submit, this penalty is not a little steep. The damages assessed were almost ten (10) times the statutory maximum for each film even allegedly exhibited. Thus, an award of \$568,000 in damages is not merely excessive, but, in fact, irrational, penal and prohibited.

Nationwide, federal courts have continually held that the minimum, not the maximum—no less ten (10) times the maximum for the films allegedly exhibited—is the appropriate award where no actual damages are shown.²⁴

21. Plaintiffs' Requests for Admissions, Docket Entry No. 175 at 6.

22. *Id.*

23. *Id.*

24. See, e.g., *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939); *Russell and Stroll Co. v. Oceanic Electrical Supply Co., Inc.*, 80 F.2d 864 (2d Cir. 1936); *Big Sky Music v. Todd*, 388 F. Supp. 498 (S.D. Ga. 1974); *Quackenbush Music, LTD v. Wood*, 381 F. Supp. 904 (M.D. Tenn. 1974); *Best Medium Publishing Co., Inc. v. National Insider, Inc.*, 259 F. Supp. 433 (N.D. Ill. 1966); *Bourne, Inc., v. Romero*, 23 F.R.D. 292 (E.D. La. 1959); *Edwin H. Morris Co., Inc. v. Burton*, 201 F. Supp. 36 (E.D. La. 1959); *Inter-City Press, Inc. v.*

The policies involved are to "discourage further infringement by the defendant,"²⁵ and to "secure enforcement of the copyright policy."²⁶ Respecting these policies requires review of the decisions below.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

Respectfully Submitted,

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APPENDIX A

Footnote 24—Continued.

Siegfried, 172 F. Supp. 37 (W.D. Missouri 1958); *Edward B. Marks Music Corp. v. Borst Music Pub. Co., Inc.*, 110 F. Supp. 913 (D.N.J. 1953); *Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc.*, 105 F. Supp. 325 (S.D.N.Y. 1952); *Eliot v. Geare-Marston, Inc.*, 30 F. Supp. 301 (E.D. Pa. 1939); *Advertisers Exchange Inc. v. Laufe*, 29 F. Supp. 1 (W.D. Pa. 1939); *Lindsay & Brewster, Inc. v. Verstein*, 21 F. Supp. 264 (S.D. Maine, 1937).

25. *Morser v. Bengor Products Co.*, 283 F. Supp. 926, 929 (S.D.N.Y. 1968).

26. *National Council of Young Israel, Inc. v. Feit Co., Inc.*, 347 F. Supp. 1293, 1299 (S.D.N.Y. 1972).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number 74-597—Civ-JE

JUDGMENT AS TO LIABILITY

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.,
Plaintiffs,
v.

SAUDCO LIMITED AND WILLIAM L. TAUB, *Defendants.*

This Court has heretofore entered its Findings of Fact and Conclusions of Law and Further Findings and Conclusions.

Accordingly, it is

ORDERED and ADJUDGED as follows:

1. "Defendants", as used in this Judgment, shall encompass each corporate and individual defendant, individually and collectively, their officers, agents, servants, employees, alter egos, attorneys, or any other person, business entity, firm or corporation, now or hereafter existing, acting in concert or participation with them or any of them.

"Motion Pictures", as used in this Judgment, shall encompass all negatives, duplicating materials, and positive prints of any motion picture which is, has been, or may hereafter be copyrighted, or produced, or released, or distributed or owned by any plaintiff, jointly or individually, or which bears the name of any plaintiff in the copyright notice or which bears in any other place the trademark or logo or name of any plaintiff.

"Plaintiffs' attorneys", as used in this Judgment, makes reference to the firm of Blackwell Walker Gray Powers

Flick & Hoehl, or its successor, or such substituted attorney for the plaintiffs as that firm or its successor shall designate by notice in writing to the herein named defendants.

2. The defendants are hereby permanently enjoined from copying, publishing, selling, leasing, renting, lending, distributing, supplying, exhibiting or distributing for exhibition, or offering to do so, or in any manner whatsoever dealing in or trafficking in any of the motion pictures without the prior written consent of the appropriate plaintiff or plaintiffs.

3. Defendants shall deliver to plaintiffs' attorneys, within ten days of the entry hereof, any of the motion pictures which are in the possession, custody or control of defendants, or any of them, and obtain a receipt for the delivery of each print, and within five days from the date of such delivery shall file with the Court and serve upon plaintiffs' attorneys affidavits of full compliance with the terms of this paragraph.

4. In the event that any of the motion pictures shall at any time hereafter come into the possession, custody or control of the defendants, or any of them, directly or indirectly, such defendants shall forthwith deliver any such motion picture to the plaintiffs' attorneys and obtain a receipt for delivery.

5. For the purpose of insuring compliance with and enforcement of this Judgment, plaintiffs, by their attorneys or other authorized representatives, shall be afforded by defendants an opportunity, during reasonable business hours, to examine any records or documents in the possession, custody or control of the defendants or any of them, relating to or referring to, directly or indirectly, any of the motion pictures, and to interview, including by way of deposition under oath, the defendants or their officers, agents, servants, employees, or attorneys with respect to any such matter.

6. The United States Marshal is hereby directed to deliver to plaintiffs' attorneys at 2400 First Federal Building, One S. E. Third Avenue, Miami, Florida 33131, possession of the motion pictures seized by him pursuant to the Writ of Seizure and Supplementary Writ of Seizure issued in this action, or, in the alternative, the United States Marshal is hereby ordered to destroy said motion picture prints.

7. The bond of Temporary Restraining Order and the bond on Writ of Seizure be and the same are each hereby discharged, and the Sureties are hereby relieved of their responsibilities thereunder.

8. On June 30th, 1975, trial will be had before this Court on the issues of damages and attorneys' fees. There will be a call of the calendar on Thursday, June 26th, 1975, at 1:00 p.m. All counsel are required to attend the call of the calendar.

DONE and ORDERED at Miami, Southern District of Florida, this 17th day of June, 1975.

/s/ JOE EATON

United States District Judge

cc: Blackwell, Walker, Gray, Powers, Flick & Hoehl

cc: Louis Vernell, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 74-597—CIV-SMA

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.,
Plaintiffs,
v.

SAUDCO LIMITED AND WILLIAM L. TAUB, *Defendants.*

JUDGMENT AS TO DAMAGES

THIS CAUSE came before the Court upon the Plaintiffs' Motion for Summary Judgment filed on October 18, 1976.

This Court rendered its Judgment As to Liability on June 17, 1975, and therein, reserved for trial the issues of damages and attorneys' fees.

By Order of January 30, 1975, the Court also reserved decisions on plaintiffs' Motion for Sanctions. This Motion has been renewed and is now before the Court.

On December 1st, 1976, the Plaintiffs filed, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 10(J) of the Rules of this Court, Requests for Admissions and a Statement of Material Facts and Proposed Findings and Conclusions. They were never answered by the Defendants and, thus, are deemed admitted. They are incorporated herein by reference. These admissions by the defendants substantiate the plaintiffs' claim for damages, sanctions, and attorneys' fees and are dispositive of those issues in this case. There remains no genuine issue of material facts which would preclude a Summary Judgment for the plaintiffs in this case on the issues of damages and attorneys' fees and sanctions.

On November 11, 1976, the Court ordered that each party answer a questionnaire as to the current status of

this case. The defendants made no reply. The Court ordered the defendants to show cause, on February 22nd, 1977, why the plaintiffs' Motion for Summary Judgment should not be granted. The defendants' attorney appeared and was given ten (10) days to reply to the Court's Order. No reply was submitted. On March 10, 1977, a further hearing was held on this Order. The secretary of defendants' counsel appeared in Court explaining the absence of the attorney for the defendants. After the elapse of another ten (10) days, and without any reply from the defendants, this Court determined to rule on the plaintiffs' Motions for Summary Judgment and for sanctions.

This Court's decision on the amount of attorneys' fees is affected by the plaintiff's Motion for Sanctions pursuant to Rule 37(d) of the Federal Rules of Civil Procedure. This Court's further findings of fact and conclusions of law on June 17th, 1975, entitled the plaintiffs to reasonable attorneys fees pursuant to Title 17 U.S.C. Sections 101, 116 and Rule 37 of the Federal Rules of Civil Procedure. These Sanctions are being imposed upon the defendants for their failure to appear at a deposition, after being served with proper notice, on July 11, 1974, January 21, 1975, and on February 10, 1975, pursuant to this Court's order of January 30, 1975, and on April 9, 1975, pursuant to this Court's order of March 25, 1975, and on May 19, 1975, pursuant to this Court's order of May 9, 1975. These Sanctions are also imposed for the defendants' willful and deliberate violation of this Court's orders of October 21, 1974, January 30, 1975, and March 25, 1975, to produce documents requested by plaintiffs in their notice to take the deposition of William L. Taub, and for defendants' failure to comply with the provisions of paragraph 3 of this Court's Judgment as to Liability entered June 18, 1975.

The Plaintiffs are entitled to tax costs before the clerk of the Court pursuant to Rule 54(d) of the Federal Rules of Civil Procedure and Rule 10(F) of the Rules of

the United States District Court for the Southern District of Florida.

Accordingly, it is ORDERED and ADJUDGED as follows:

1. That the defendants knowingly, willfully, and with notice infringed upon the plaintiffs' copyrights in violation of the Copyright Laws of the United States. The total number of infringements are at least One Hundred Six (106) in number, as determined in this Court's findings of fact and conclusions of law, filed June 18, 1975.

In the exercise of the Court's discretion pursuant to Section 101 of Title 17 U. S. Code damages are determined as follows:

<u>Plaintiffs</u>	<u>Number of Infringe- ments</u>	<u>Statutory Damages</u>	<u>Total</u>
Twentieth Century-Fox Film Corporation	40 ×	\$5,000.00 =	\$200,000.00
Columbia Pictures Industries, Inc.	20 ×	5,000.00 =	100,000.00
United Artists Corporation	8 ×	5,000.00 =	40,000.00
Universal City Studios, Inc.	21 ×	5,000.00 =	105,000.00
Warner Bros. Pictures, Inc.	6 ×	5,000.00 =	30,000.00
Walt Disney Productions	1 ×	5,000.00 =	5,000.00
Metro-Goldwyn-Mayer, Inc.	10 ×	5,000.00 =	50,000.00

2. That attorneys' fees be awarded to the plaintiffs pursuant to Section 116 of Title 17 U. S. Code in the total amount of FIFTY-SEVEN THOUSAND THREE HUNDRED SEVENTY-FIVE and no/100ths (\$57,375.00) DOL-

LARS/ to be shared per capita, for 143 hours of partners' time at the rate of \$100.00 per hour, 273 hours of associates' time at the rate of \$75.00 per hour and 35 hours of para-legal time at the rate of \$40.00 per hour.

3. That sanctions should be imposed under circumstances presented by defendants' conduct during the pendency of this action, including defendants' failure to comply with paragraph 3 of the Judgment as to Liability requiring them to deliver up the motion pictures and to file compliance affidavits with this Court.

Sanctions consisting of an award of attorneys' fees in an amount of NINETEEN HUNDRED and no/100ths (\$1,900.00) DOLLARS for 40 hours of partners' time at the rate of \$100.00 and 20 hours of associates' time at the rate of \$75.00 per hour would be appropriate. Since, however, the Court has awarded attorneys' fees for the action, other forms of sanctions would be more appropriate and are determined as follows:

(a) Liens of National Airlines for transportation and storage charges amount to TWO THOUSAND NINE HUNDRED FIFTEEN and 05/100ths (\$2,915.05) DOLLARS with interest at the rate of six (6%) percent per annum from the date payment was due (Florida Statutes 687.01), the interest accrued from October 2, 1976, to April 2, 1977, amounts to SIX HUNDRED TWELVE and 16/100ths (\$612.16) DOLLARS. The total amount due National Airlines is THREE THOUSAND FIVE HUNDRED TWENTY-SEVEN and 21/100ths (\$3,527.21) DOLLARS.

(b) World Terminal and Distributing Corporation incurred the warehouse charges for the storage of the motion picture prints including those under the Writ of Seizure issued by this Court. As of April 9, 1977, such charges amount to ONE THOUSAND ONE HUNDRED SEVENTY-SIX and 14/100ths (\$1,175.14)

DOLLARS. This amount has been computed as follows:

Custom charges	\$ 10.50	
In and out handling ..	25.92	
Trucking	8.08	
Storage	1,130.64	(\$26.92 per month since October 9, 1975)
Total	\$1,175.14	

Accordingly, the Court awards as sanctions the total amount of FOUR THOUSAND SEVEN HUNDRED THREE and 35/100ths (\$4,703.35) DOLLARS to be shared per capita.

4. Accordingly, the Court directs that judgment be entered against the defendants as follows in favor of:

(A) Twentieth Century-Fox	
Film Corporation	\$208,868.34
(B) Columbia Pictures	
Industries, Inc.	108,868.34
(C) United Artists Corp.	48,868.34
(D) Universal City Studios, Inc. ...	113,868.34
(E) Warner Bros. Pictures, Inc. ...	18,868.34
(F) Walt Disney Productions	13,868.34
(G) Metro-Goldwyn-Mayer, Inc. ...	58,868.34

together with such costs as may be taxed on appropriate application to the Clerk of this Court.

DONE and ORDERED at Miami, Southern District of Florida, this 27th day of May, A.D., 1977.

/s/ SIDNEY ARONOVITZ
United States District Judge

cc: Blackwell, Walker, Gray,
Powers, Flick & Hoehl
cc: Louis Vernell, Esq.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2686

SUMMARY CALENDAR*

TWENTIETH CENTURY-FOX FILM CORPORATION,
ET AL.,

Plaintiff-Appellee

v.

SAUDCO LIMITED and WILLIAM L. TAUB,
Defendants-Appellants,

Appeal from the United States District Court for the
Southern District of Florida

(June 1, 1978)

Before GOLDBERG, AINSWORTH and HILL,
Circuit Judges

PER CURIAM:

Defendants, Saudco Limited and William L. Taub, appeal to this Court from the award of damages granted to plaintiffs, Twentieth Century-Fox Film Corporation et al., in this copyright infringement action. Defendants have not contested the District Court's adjudication of their liability.

* Rule 18, 5 Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F.2d 409.

We hold that the defendants waived any issue of improper joinder of parties plaintiff by their failure to raise the issue until their motion for relief from judgment.

The District Court correctly granted summary judgment in favor of the plaintiffs on the issue of damages. No trial was required in view of the defendants failure to address or object to plaintiffs' requests for admissions. In view of the resulting admissions, no material facts were in dispute. Fed. R. Civ. P., Rules 36, 56(e).

The District Court's award of the maximum statutory damages pursuant to 17 U.S.C. § 101(b) was well within its discretion in view of the repeated failure of defendants to respond to plaintiffs discovery attempts seeking to establish their actual damages. No abuse of discretion appears in the record.

The District Court likewise acted well within its discretion in awarding plaintiffs their attorney's fees pursuant to 17 U.S.C. § 116.

The District Court properly denied defendants' motion for relief from judgment. Defendants have not shown that a meritorious defense exists to the merits of the suit. The record clearly shows that defendants and their counsel worked closely together on the suit for years. There is no evidence that defendants were misled by counsel.

The record is replete with evidence of defendants' instructions to counsel and responses to counsels' requests and directions illustrating that defendants concurred in the obstructionist tactics employed in this litigation for over three years. Defendants cannot ignore court orders for years, through one attorney, and, being disappointed with that course of action, demand new relief, through new counsel, on account of their own prior conduct through their own prior counsel.

AFFIRMED.

OCT 2 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-355

SAUDCO LIMITED AND WILLIAM L. TAUB,
Petitioners,

v.

TWENTIETH CENTURY-FOX FILM
CORPORATION, *et al.*,*Respondents.*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**RESPONDENTS' BRIEF IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI**HERBERT C. EARNSHAW
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POWERS, FLICK & HOEHL*Attorneys for Respondents*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

◆
No. 78-355

SAUDCO LIMITED AND WILLIAM L. TAUB,
Petitioners,
v.

TWENTIETH CENTURY-FOX FILM CORPORATION, ET AL.,
Respondents.

◆
ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI

Respondents, the plaintiffs in the District Court and appellees in the Court of Appeals, oppose the Petition of Saudco Limited and William L. Taub for a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari should be denied because:

- (1) Rule 19 does not provide any basis for granting the Petition; and

(2) the petitioners seek to present a question which was never raised in the District Court or in the Appellate Court.

Although the Petition does irreparable damage to the factual record and legal issues in this action, we do not stop to correct these gross distortions because they are, in all events, irrelevant to this Court's consideration of the Petition. Petitioners simply have shown no basis that would justify the granting of a Writ of Certiorari.

In 1975, a default judgment determining the petitioners' liability (A1-A3*) was granted by the District Court because of the petitioners' intractable refusal to give any discovery. (Petition, p. 6) As the Fifth Circuit pointed out in its opinion affirming the judgment as to damages, "Defendants have not contested the District Court's adjudication of their liability." (A15)

In 1977, the District Court entered its Judgment as to Damages (A7-A11) setting forth the course of events and considerations underlying its determination of damages. Damages were assessed pursuant to the discretionary authority granted by Congress in Section 101 of the Copyright Law (17 U.S.C. § 101) based upon facts deemed to have been admitted by petitioners:

"On December 1st, 1976, the Plaintiffs filed, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 10(J) of the rules of this Court, Requests for Admissions and a Statement of Material Facts and Proposed Findings and Conclusions. They were never answered by the Defendants and, thus, are deemed admitted. They are incorporated herein by reference. These admissions by the defendants substantiate the

plaintiffs' claim for damages, sanctions, and attorneys' fees and are dispositive of those issues in this case. There remains no genuine issue of material facts which would preclude a Summary Judgment for the plaintiffs in this case on the issues of damages and attorneys' fees and sanctions." (A7) (Emphasis added.)

The District Court gave the petitioners ample opportunity to contest the facts and was met with contumacious refusal. Its opinion recites the facts:

"On November 11, 1976, the Court ordered that each party answer a questionnaire as to the current status of this case. The defendants made no reply. The Court ordered the defendants to show cause, on February 22nd, 1977, why the plaintiffs' Motion for Summary Judgment should not be granted. The defendants' attorney appeared and was given ten (10) days to reply to the Court's Order. No reply was submitted. On March 10, 1977, a further hearing was held on this Order. The secretary of defendants' counsel appeared in Court explaining the absence of the attorney for the defendants. After the elapse of another ten (10) days, and without any reply from the defendants, this Court determined to rule on the plaintiffs' Motions for Summary Judgment and for sanctions." (A7-A8)

On the basis of the facts admitted by the petitioners, the District Court found that the "defendants knowingly, willfully and with notice infringed upon the plaintiffs' copyrights in violation of the Copyright Laws of the United States" at least 106 times. (A9) Accordingly, "[i]n the exercise of the court's discretion pursuant to

*Citations preceded by the letter "A" are to the opinions below included as an appendix to the Petition.

Section 101 of Title 17 U.S. Code," and on the admitted facts, the District Court assessed statutory damages in the amount of \$5,000 per infringement. (*Id.*) In so doing, the District Court found that the "admissions by the defendants substantiate plaintiffs' claim for damages" (A7)

The Fifth Circuit Court of Appeals in 1978 upheld the District Court's sound exercise of its discretion in awarding damages. Its *per curiam* opinion stated:

"The District Court correctly granted summary judgment in favor of the plaintiffs on the issue of damages. No trial was required in view of the defendants' failure to address or object to plaintiffs' request for admissions. In view of the resulting admissions, no material facts were in dispute. Fed. R. Civ. P., Rules 36, 56(e).

"The District Court's award of the maximum statutory damages pursuant to 17 U.S.C. § 101(b) was well within its discretion in view of the repeated failure of defendants to respond to plaintiffs discovery attempts seeking to establish their actual damages. No abuse of discretion appears in the record." (A16)*

On July 5, 1978, the Fifth Circuit denied petitioners' request for a stay of issuance of that Court's mandate. On July 31, 1978, Mr. Justice Powell denied petitioners' motion in this Court for the same relief.

*The Court also pointed out:

"The record is replete with evidence of defendants' instructions to counsel and responses to counsels' requests and directions illustrating that defendants concurred in the obstructionist tactics employed in this litigation for over three years. Defendants cannot ignore court orders for years, through one attorney, and, being disappointed with that course of action, demand new relief, through new counsel, on account of their own prior conduct through their own prior counsel." (A16)

There simply is no basis for the petitioners' outrageous claims that the lower Court's determinations were "misguided" or were undertaken "to penalize petitioners for their litigation behavior rather than properly fix statutory damages under the Copyright Act." (Petition, pp. 13, 14.)* Instead, as both the District Court and the Court of Appeals held, the amount of damages assessed by the Court was proper, was supported by the record, and was well within the Court's statutory discretion. Indeed, the District Court awarded less than the max-

*Petitioners somehow try to find support for their erroneous position by pointing out that the District Court detailed in its judgment the petitioners' many failures to comply with the Court's orders. (Petition, p. 13 n.17.) The District Court made explicit, however, that it considered such gross and flagrant violations of conduct to be relevant to the amount of attorneys' fees awarded and sanctions imposed under Federal Rule of Civil Procedure 37:

"This Court's decision on the amount of attorneys' fees is affected by the plaintiff's Motion for Sanctions pursuant to Rule 37(d) of the Federal Rules of Civil Procedure. This Court's further findings of fact and conclusions of law on June 17th, 1975, entitled the plaintiffs to reasonable attorneys fees pursuant to Title 17 U.S.C. Sections 101, 116 and Rule 37 of the Federal Rules of Civil Procedure. These Sanctions are being imposed upon the defendants for their failure to appear at a deposition, after being served with proper notice, on July 11, 1974, January 21, 1975, and on February 10, 1975, pursuant to this Court's order of January 30, 1975, and on April 9, 1975, pursuant to this Court's order of March 25, 1975, and on May 19, 1975, pursuant to this Court's order of May 9, 1975. These Sanctions are also imposed for the defendants' willful and deliberate violation of this Court's orders of October 21, 1974, January 30, 1975, and March 25, 1975, to produce documents requested by plaintiffs in their notice to take the deposition of William L. Taub, and for defendants' failure to comply with the provisions of paragraph 3 of this Court's Judgment as to Liability entered June 18, 1975." (A8)

Neither in the Court of Appeals nor here have petitioners challenged the District Court's authority to assess such sanctions. The Court of Appeals, without bothering to advert to the obvious propriety of Sanctions under Rule 37, held simply: "The District Court likewise acted well within its discretion in awarding plaintiffs their attorneys' fees pursuant to 17 U.S.C. § 116." (A16)

imum amount of statutory "in lieu of" damages that it could have assessed under the facts presented.*

ARGUMENT

Rule 19(1) of the Rules of this Court is explicit that "[a] review on Writ of Certiorari . . . will be granted only where there are special and important reasons therefor." Petitioners herein purport to invoke that portion of Rule 19 which permits review by Writ of Certiorari "where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter . . . or has decided a federal question in a way in conflict with applicable decisions of this court. . . ." (Supreme Court Rule 19(1)(b); Petition, p. 10).

No case cited by petitioners holds that the assessment of damages in the sound exercise of the discretion of the District Court and within the statutory limits established by Congress is improper or impermissible. Indeed, no case could so hold.

No case cited by petitioners even remotely suggests that the assessment of damages pursuant to the statutory "in lieu of" standard and consonant with admitted supporting facts constitutes the assessment of a penalty or forfeiture. Again, no case could so hold.

No fact cited by petitioners tends to establish that the District Court abrogated its statutory responsibility by assessing a penalty or forfeiture against the petitioners. To the contrary, the facts demonstrate, and the Court of

*Under Section 101, the District Court was at liberty to disregard the so-called "maximum" of \$5,000 per infringement because of its unchallenged finding that the infringements were committed "knowingly, willfully, and with notice." (Judgment as to Damages, A9) See 17 U.S.C. § 101(b) ("[N]or shall the limitation as to the amount of recovery apply to infringements occurring after actual notice to a defendant . . .").

Appeals held, that the District Court's award of damages represented a sound exercise of its statutory discretion and was amply supported by the facts.

Even granting petitioners' point that Section 101 of the Copyright Law was not designed to impose a penalty, there is no suggestion in the opinion below that a penalty was assessed. The numerous cases cited by petitioners simply have no application here: all are based on facts not even vaguely similar to those presented in this action. Certainly, they do not indicate a conflict among the Circuits or a conflict with this Court's prior decisions.

Furthermore, petitioners have not explained how, having failed to raise the issue of penalties in the District Court or in the Court of Appeals, they may do so now. It requires no citation to establish that petitioners are not permitted so to abuse the basic tenets of appellate practice.

In view of these circumstances, petitioners have utterly failed to establish any "special and important reasons" that would justify the expenditure of this Court's time, and the resources of the respondents, in further prolonging an action that has reached its just and logical terminus.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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